IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
March 17, 2009 Session

STATE OF TENNESSEE v. ROBERT BAKER, JR.

Appeal from the Circuit Court for Franklin County
No. 16848 J. Curtis Smith, Judge

No. M2008-01454-CCA-R3-CD - Filed October 28, 2009

Appellant, Robert Baker, Jr., was pulled over by a police officer in Winchester, Tennessee. After failing to perform two field sobriety tests and refusing to take a blood alcohol test, the officer arrested Appellant and took him to jail. The Franklin County Grand Jury indicted Appellant for driving under the influence ("DUI"), DUI, fourth offense, violation of the implied consent law, and reckless driving. Appellant filed a motion to suppress evidence of the field sobriety tests. This motion was unsuccessful. At the conclusion of a bifurcated jury trial, Appellant was found guilty of DUI and DUI, third offense. Appellant filed a successful motion for new trial, and the trial court conducted a bench trial on whether or not Appellant was guilty of DUI, fourth offense. At the conclusion of the bench trial, Appellant was convicted of DUI, third offense. Appellant now appeals from his conviction for DUI, third offense. Appellant argues that the trial court erred in denying his motion to suppress, that a previous DUI conviction in Minnesota was too remote in time to be used to enhance his DUI conviction, that the Minnesota conviction and a previous conviction in Rutherford County, Tennessee, were facially invalid and could not be used to enhance his DUI conviction, that the evidence was insufficient to support the conclusion that he was under the influence of an intoxicant when he was pulled over, and that the combination of all errors requires a reversal of his conviction. After a thorough review of the record, we conclude that the motion to suppress was correctly denied; the Minnesota conviction was within twenty years of the conviction in question, and therefore, not too remote; the Minnesota and Rutherford County convictions were not facially invalid; the evidence presented was sufficient to support Appellant's conviction; and there was no combination of errors such that Appellant's conviction must be reversed. Therefore, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

Norris A. Kessler, III, Winchester, Tennessee, for the appellant, Robert Baker, Jr..

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; J. Michael Taylor, District Attorney General, and William Copeland, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On September 9, 2005, a little after 1:00 a.m., Officer Stacy Shrum, an officer with the Winchester Police Department, saw a car "bouncing back and forth between the yellow line and the white line." At one point the vehicle made a left-hand turn onto another road, and veered over into the lane of oncoming traffic. Officer Shrum stopped the vehicle. Appellant was the driver.

The officer stated that he could smell alcohol on Appellant when he approached the vehicle. Officer Shrum suspected Appellant of being intoxicated. At some point during the stop, Appellant told the officer he had been at the Oasis and he had consumed a couple of beers earlier in the evening. He asked Appellant to step out of the car. When Appellant got out of the car, he was unsteady on his feet and was speaking slowly. Officer Shrum asked Appellant to perform the walk-and-turn and the one-legged stand field sobriety tests. Officer Shrum both explained and demonstrated how to perform the tests. The officer did not recall Appellant telling him that he had a physical impairment or that he needed to wear special work boots, which were in the vehicle, to support his ankles. Appellant was unable to perform the walk-and-turn test correctly. In fact, another officer on the scene had to catch Appellant to keep him from falling to the ground when Appellant lost his balance during the test. When asked to perform the one-legged stand test, Appellant initially told the officer he could not complete the test. Appellant did eventually try and could not balance. After the administration of the field sobriety tests, Appellant made a telephone call. Office Shrum overheard Appellant ask someone to come get the car because he was under arrest.

Officer Shrum next read the implied consent form to Appellant. The implied consent form informs the individual that if they do not submit to a blood alcohol test their driver's license will be suspended. Appellant initially agreed to take the blood alcohol test, however, by the time he and the officer arrived at the hospital, Appellant had changed his mind. Appellant requested to have a lawyer present for the drawing of his blood. Because a lawyer's presence is not legally required at the drawing of blood, Officer Shrum took Appellant to jail at this point. Officer Shrum testified that he did not hear anything regarding Appellant's wife, a nurse, coming to the hospital to draw the blood. After Appellant was admitted to the jail, Officer Shrum conducted a full inventory of Appellant's vehicle which had been towed to the Winchester Police Department. Officer Shrum did not find any boots in Appellant's vehicle during his inventory.

Officer Adam Wade McKinney is also an officer with the Winchester Police Department. He arrived at the scene immediately before Officer Shrum began to administer the field sobriety

tests. When he arrived, he noticed that Appellant smelled of alcohol and he was very unsteady on his feet. Appellant's performance on the walk-and-turn test was extremely poor. Officer McKinney had to almost catch Appellant to keep him from falling over during the test. Appellant also almost fell down during the one-legged stand test. Officer McKinney could not recall if Appellant told Office Shrum about any physical impairments. Officer McKinney definitely believed that Appellant was under the influence at the time of the stop.

Sergeant Kevin Grant works for the Franklin County Sheriff's Department and was involved with Appellant's intake into the jail. Upon Appellant's arrival, Sergeant Grant noted that Appellant smelled of alcohol, his speech was slurred, and he was unable to walk in a straight line. Sergeant Grant has seen many individuals come in following DUI arrests, and in his opinion, Appellant was intoxicated.

Sonya Simmons testified that on September 8, 2009, Appellant installed a ceiling fan for her. Appellant was at her house from about 5:00 p.m. to 8:00 p.m. According to Ms. Simmons, Appellant did not drink while he was at her house. He did not smell of alcohol or appear intoxicated.

Randy Taylor testified that he has known Appellant his entire life. When Mr. Taylor needs some work done around his house, Appellant helps him. Around 8:00 p.m. on September 8, 2005, Appellant came to Mr. Taylor's home to help fix his shower. Before Appellant came to Mr. Taylor's house, Appellant installed a ceiling fan at the house of one of Mr. Taylor's friends. According to Mr. Taylor Appellant and he worked on the shower until 1:00 a.m. on September 9. Later on September 9, Appellant told Mr. Taylor that he was pulled over by the police after leaving Mr. Taylor's house. Mr. Taylor stated that he did not see Appellant consume any alcoholic beverages, and Appellant was not drunk when he left his house.

In the early morning of September 9, 2005, Sharon Baker, Appellant's wife, testified that she received a telephone call from Appellant. Appellant told her that he wanted her to come to the hospital because he was getting his blood drawn. He wanted Mrs. Baker there to help. Appellant wanted Mrs. Baker to draw the blood because he has rolling veins. In the five years that they have been married, Appellant has not had his blood drawn by anyone other than Mrs. Baker. When she received the telephone call, she got dressed and went to the hospital. Appellant was already gone when she arrived at the hospital. She proceeded to call a bondsman and went to the jail. She saw Appellant at the jail around 2:00 a.m. Mrs. Baker stated that Appellant was not drunk and he did not smell of alcohol when she arrived at the jail. Mrs. Baker also stated that Appellant has weak ankles and bad feet. She was not surprised that he could not perform the field sobriety tests.

Appellant testified that on September 8, 2005, Appellant left for work at Arnold Air Force Base at 6:15 a.m. He worked until 3:30 p.m. Around 5:00 p.m., Appellant went to Sonya Simmons house to hang a ceiling fan. He did not consume any alcohol before arriving at her house. He left Ms. Simmons house around 8:00 p.m. and went to Mr. Taylor's house. Appellant had not consumed any alcohol that day. He stayed at Mr. Taylor's house until 1:00 a.m. and did not consume any alcohol while at Mr. Taylor's house. After leaving Mr. Taylor's house, he was pulled over by

Officer Shrum. According to Appellant, Officer Shrum asked Appellant to follow the officer's pen and then put his hand to his own nose. Appellant stated that he had not been to the Oasis that night, but that he had driven by the Oasis. He thought that Officer Shrum was asking if he had driven by the Oasis.

According to Appellant, after performing those two tests, Officer Shrum asked Appellant to do the walk-and-turn. Appellant stated that he told the officer that he could not perform the test because his ankles "flip over." Appellant cannot perform precise movements unless he wears his work boots. On the night in question, Appellant had worn the boots while at Mr. Taylor's house and had changed. The boots were in the trunk of his vehicle. Appellant stated that Officer Shrum insisted that he perform the tests even after he informed Shrum of his physical impairment. Appellant asked if he could get his boots out of the trunk, but the officer told him that he did not have time. Appellant admitted that he had trouble with both the walk-and-turn test and the one-legged stand, but he insisted that it was due to his floating ankles, not alcohol consumption.

After the one-legged stand test, Officer Shrum told Appellant that he was under arrest. At this point, according to Appellant, he called his wife to pick up the car and meet him at the hospital. When they arrived at the hospital, Appellant told the officer that he wanted his lawyer present and his wife was on the way. According to Appellant, Officer Shrum became angry and told him that he did not have to wait on anyone and loaded him back into the patrol car. Appellant requested three or four times to give blood to prove that he had not been drinking.

In the January 2006 Session, the Franklin County Grand Jury indicted Appellant for driving under the influence ("DUI"), DUI, fourth offense, violation of the implied consent law, and reckless driving. On March 30, 2006, Appellant filed a motion to suppress the evidence of the field sobriety tests. On May 9, 2006, the trial court held a hearing on the motion. At the conclusion of the hearing, the trial court denied Appellant's motion to suppress.

On August 10, 2006, the trial court held a jury trial. The jury found Appellant guilty of DUI and not guilty of reckless driving. After this verdict was announced, the jury heard evidence concerning the DUI, fourth offense charge. The State presented copies of previous convictions for DUI, one from Minnesota and two from Tennessee. The jury found Appellant guilty of DUI, third offense.

On November 14, 2006, the trial court held a sentencing hearing. At the conclusion of the sentencing hearing, the trial court imposed a sentence of eleven months and twenty-nine days, with the order that Appellant serve 120 days, pay the $5,000 fine imposed by the jury, and perform 100 hours of public service.

On December 13, 2006, Appellant filed a motion for new trial. On April 2, 2007, the trial court granted Appellant's motion for new trial. Subsequently, on June 8, 2007, the trial court amended the order to state that the motion for new trial was granted with regard solely to count two, DUI fourth offense. On November 2, 2007, the trial court held a bench trial on the second count of

the indictment for DUI, fourth offense. The State entered copies of the same three convictions, one from Minnesota and two from Tennessee. On February 22, 2008, the trial court entered an order convicting Appellant of DUI, fourth offense.

On March 28, 2008, the trial court held a sentencing hearing. At the beginning of the sentencing hearing, Appellant objected to his conviction for DUI, fourth offense on the basis that the jury had convicted him of DUI, third offense, and he did not believe that he could be convicted of a greater offense than that of which the jury had convicted him. The trial judge agreed and stated that although he had held that the three previous convictions were valid, he was confined to DUI, third offense because of the jury's previous determination. The trial court modified its judgment to DUI third offense. At the conclusion of the hearing, the trial court imposed a sentence of eleven months and twenty-nine days with 120 days to serve and 100 hours of public service. Appellant's driver's license was also suspended for three years.

Appellant filed a second motion for new trial. The trial court heard argument on the motion on June 10, 2008. At the conclusion of the hearing, the motion was denied. Appellant filed a timely notice of appeal.

ANALYSIS

Motion to Suppress

Appellant's first issue is that the trial court erred in denying Appellant's motion to suppress the field sobriety tests. Appellant argues that the trial court should have granted his motion because the walk-and-turn and one-legged stand tests should be supported by "scientific, technical, or other specialized knowledge" as required by Rule 702 of the Tennessee Rules of Evidence. The State argues that the trial court's denial was correct.

At the conclusion of the hearing on the motion to suppress, the trial court overruled the motion to suppress because the trial court determined that the issue of the field sobriety tests was an issue of credibility. Our standard of review for a trial court's findings of fact and conclusions of law on a motion to suppress evidence is set forth in *State v. Odom*, 928 S.W.2d 18 (Tenn. 1996). Under this standard, "a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." *Id.* at 23. As is customary, "the prevailing party in the trial court is afforded the 'strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence.'" *State v. Carter*, 16 S.W.3d 762, 765 (Tenn. 2000) (quoting *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998)). Nevertheless, this Court reviews de novo the trial court's application of the law to the facts, without according any presumption of correctness to those conclusions. *See State v. Walton*, 41 S.W.3d 775, 81 (Tenn. 2001); *State v. Crutcher*, 989 S.W.2d 295, 299 (Tenn. 1999).

In *State v. Murphy*, 953 S.W.2d 200 (Tenn. 1997), our supreme court addressed the issue of whether evidence presented of the Horizontal Gaze Nystagmus ("HGN") test, another field sobriety

test, fell under the "scientific, technical or other specialized knowledge" component of Rule 702 of the Tennessee Rules of Evidence. 953 S.W.2d at 201. Our supreme court determined that the HGN test did require the testimony of a witness approved under Rule 702. *Id.* at 203. However, the court also discussed why the HGN test differs from other tests. The court stated the following:

> In our view, the HGN test does differ fundamentally from other field sobriety tests because the witness must necessarily explain the underlying scientific basis of the test in order for the testimony to be meaningful to a jury. Other tests, in marked contrast, carry no such requirement. For example, if a police officer testifies that the defendant was unable to walk a straight line or stand on one foot or count backwards, a jury needs no further explanation of why such testimony is relevant to or probative on the issue of the defendant's condition. A juror can rely upon his or her personal experience or otherwise obtained knowledge of the effects of alcohol upon one's motor and mental skills to evaluate and weigh the officer's testimony. However, if a police officer testifies that the defendant exhibited nystagmus, that testimony has no significance to the average juror without an additional explanation of the scientific correlation between alcohol consumption and nystagmus. In effect, the juror must rely upon the specialized knowledge of the testifying witness and likely has no independent knowledge with which to evaluate the witness's testimony.

Id. at 202-03. This language clearly states that an officer can testify regarding both the walk-and-turn (walking in a straight line) and the one-legged stand tests without the requirement of Rule 702 approval.

Because we find no authority requiring qualified expert testimony pursuant to Rule 702 about the walk-and-turn and one-legged stand field sobriety tests, the failure to present expert testimony is not a basis upon which to exclude evidence of the field sobriety tests administered to Appellant. We conclude that the trial court's denial of the motion to suppress was correct.

Time of Minnesota Conviction

Appellant also argues that the trial court erred in approving the admission of a certified copy of a prior conviction for driving under the influence in 1988 in Minnesota because the conviction was too remote in time. The State argues that the trial court properly admitted the conviction.

Tennessee Code Annotated section 55-10-403(a)(3), which governs the methodology for determining multiple DUI offenses, states the following:

> For purposes of this section, a person who is convicted of a violation of § 55-10-401 shall not be considered a repeat or multiple offender and subject to the

> penalties prescribed in subsection (a), if ten (10) or more years have elapsed between the conviction and any immediately preceding conviction for a violation. If, however, a person has been convicted of a violation of § 55-10-401 within ten (10) years of the present violation, then the person shall be considered a multiple offender and is subject to the penalties imposed upon multiple offenders by the provisions of subsection (a). If a person is considered a multiple offender under this subdivision (a)(3), then every conviction for a violation of § 55-10-401, within ten (10) years of the immediately preceding violation shall be considered in determining the number of prior offenses, but in no event shall a conviction for a violation occurring more than twenty (20) years from the date of the instant conviction be considered for that purpose.

In *State v. Tracy Gober*, No. E2001-00296-CCA-R9-CO, 2001 WL 1089508 (Tenn. Crim. App., at Knoxville, Sept. 18, 2001), this Court analyzed this statute. After analyzing the plain meaning of the language in the statute, we concluded that "whenever an offender maintains a ten-year DUI conviction free period, the State is barred from using any prior convictions beyond that period for purposes of enhanced punishment." *Tracy Gober*, 2001 WL 1089508, at *2; *see also State v. Leodish Coe*, No.W2006-02481-CCA-R3-CD, 2007 WL 4258179, *1-2 (Tenn. Crim. App., at Jackson, Dec. 5, 2007), *perm. app. denied*, (Tenn. May 5, 2008).

Appellant's current conviction occured on March 28, 2008. The prior conviction in Franklin County was on January 9, 2001. That is within ten years of the current conviction. The next conviction immediately preceding the Franklin County conviction is on July 24, 1997, originating in Rutherford County. The Rutherford County conviction is within ten years of the Franklin County conviction. The conviction out of Minnesota occurred on May 17, 1988. The Minnesota conviction is within ten years of the Rutherford County conviction.

In addition to requiring prior convictions to occur within ten years of the immediately preceding conviction, the statute requires that all convictions considered in determining multiple DUI offender status be within twenty years of the date of the current conviction. The current conviction occurred on March 28, 2008. The Minnesota conviction occurred on May 17, 1988. For the current conviction to have occurred more than twenty years after the Minnesota conviction, the conviction would have had to have occurred after May 17, 2008. Clearly that is not the case in this situation.

The timing of the Minnesota conviction fits within the framework set out by Tennessee Code Annotated section 55-10-403(a)(3). Therefore, we conclude that the trial court did not err in allowing that conviction into evidence.

Validity of Minnesota and Rutherford County Convictions

Appellant also argues that his Rutherford County and Minnesota prior DUI convictions are invalid because the Rutherford County conviction was not signed by Appellant and the Minnesota conviction was not signed by the judge. The State argues that the judgments are both facially valid.

In *State v. McClintock*, 732 S.W.2d 268 (Tenn. 1987), our supreme court held that a facially invalid judgment cannot be used to enhance punishment in a subsequent prosecution. 732 S.W.2d at 272-73. However, a facially valid judgment from a court with subject matter and personal jurisdiction cannot be collaterally attacked in proceedings in which the conviction in question is being used to enhance punishment. *Id.* at 272. In Rule 32(e) of the Tennessee Rules of Criminal Procedure states, "[a] judgment of conviction shall be signed by the judge and entered by the clerk . . . [and] a judgment of conviction shall include: (A) the plea; (B) the verdict or findings; and (C) the adjudication and sentence." In addition, to be used to enhance punishment in a subsequent proceeding, a conviction must include whether the defendant waived representation by counsel or not. *State v. Whaley*, 982 S.W.2d 346, 348, n.3 (Tenn. Crim. App. 1997).

The Rutherford County conviction is signed by the judge and entered by the clerk. The judgment also indicated that Appellant pled guilty, was found guilty by the trial court, and it specifies the sentence imposed. While it is true that the judgment form does not include Appellant's signature or his attorney's signature, this is not required under Rule 32(e) or case law. Therefore, because the judgment form contains everything required by Rule 32(e) and case law, it is not facially invalid.

The information sent from Minnesota to show his previous conviction includes an "Abstract of Court Record" and "Certificate of Conviction or Report of Hearing." Appellant's argument is that the conviction is not signed by the judge. However, after reviewing the document entitled "Certificate of Conviction or Report of Hearing" we find the judge's signature on the page. Therefore, Appellant's challenge of the validity of the Minnesota conviction must fail.

These issues are without merit.

Sufficiency of the Evidence

Appellant also argues that the evidence was insufficient to support his conviction for DUI, third offense. Appellant makes no argument in this section regarding the enhancement of the DUI conviction to third offense, but rather, focuses on the evidence presented to convict him of DUI. The State argues that the evidence was sufficient to support his conviction.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the" State's witnesses and resolves all conflicts in the testimony in favor of the state. *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked

with a presumption of innocence, the jury verdict of guilty removes this presumption "and replaces it with one of guilt." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. *Id.* The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Harris*, 839 S.W.2d at 75. In making this decision, we are to accord the state "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." *See Tuggle*, 639 S.W.2d at 914. As such, this Court is precluded from re-weighing or reconsidering the evidence when evaluating the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." *Matthews*, 805 S.W.2d at 779. Further, questions concerning the credibility of the witnesses and the weight and value to be given to evidence, as well as all factual issues raised by such evidence, are resolved by the trier of fact and not the appellate courts. *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990).

Tennessee Code Annotated section 55-10-401(a)(a)(1) states, "It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any public roads . . . while: (1) Under the influence of any intoxicant . . . ." On appeal, Appellant argues that the evidence was insufficient to meet the requirements of this statute because of the testimony of his witnesses that he did not drink the evening in question and that he had a physical impairment. However, as stated above, the trier of fact makes the final determination as to the credibility of the witnesses and the weight and value to be given to evidence. *Pruett*, 788 S.W.2d at 561. Clearly, the jury determined the officers' testimony to be more credible and have more weight than that of Appellant's witnesses.

When viewing the evidence in a light most favorable to the State, Officer Shrum saw Appellant "bouncing between the yellow and white lines" in the road. When Appellant attempted a left-hand turn, he veered into the oncoming lane of traffic. After being pulled over, Officer Shrum smelled alcohol on Appellant. Shrum administered both the walk-and-turn and the one-legged stand test. Appellant was unable to perform either test. In fact, he almost fell to the ground when attempting the walk-and-turn test. This is adequate evidence for a reasonable trier of fact to conclude that Appellant was under the influence of an intoxicant.

Therefore, this issue is without merit.

Cumulative Error

Appellant's final issue is that a combination of errors in the trial necessitate the reversal of his conviction. However, we have found all of Appellant's issues to be meritless. Therefore, we conclude that there is not a combination of errors in the case at hand that requires reversal.

CONCLUSION

For the foregoing reasons, we affirm the judgments of the trial court.

_____

JERRY L. SMITH, JUDGE